

STATE OF MICHIGAN
COURT OF APPEALS

RAMONE TAYLOR,

Plaintiff-Appellee,

V

SANDRA BOMAR-PARKER and HELEN
MADDEN,

Defendant-Appellants,

and

CITY OF DETROIT, ALBERT MARTIN, and
HENRY WALLACE,

Defendants.

UNPUBLISHED

August 19, 2003

No. 231085

Wayne Circuit Court

LC No. 98-804168-NO

Before: Smolenski, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendants-Appellants (hereafter defendants) Madden and Bomar-Parker appeal the trial court's denial of their motions for summary disposition, directed verdict, and judgment notwithstanding the verdict (JNOV), new trial, or remittitur. Plaintiff brought this action against defendants following an incident in which he, as a passenger on a city of Detroit bus, was assaulted by a city bus driver. Because we conclude that defendants were entitled to a directed verdict, we reverse.

I. Facts and Proceedings

Plaintiff boarded a Detroit city bus and, being uncertain about whether he had the correct change, "suggested" to the driver, defendant Wallace, that he might need five more cents to pay for a transfer slip. Plaintiff inserted his money into the fare box, Wallace pushed a button, and the money fell into the box. Wallace's actions led plaintiff to believe that he had deposited enough money for the transfer slip; however, Wallace repeatedly refused to give plaintiff a transfer slip, told plaintiff he was stupid, and, after having berated plaintiff, told plaintiff to get off the bus. After additional refusals of his request, plaintiff asked several more times for a transfer slip and then grabbed four or five transfer slips and started to walk off the bus. Before he fully exited the bus, plaintiff turned toward Wallace to throw the transfer slips back at him and saw Wallace leap from the driver's seat and begin to attack him.

Wallace jumped on plaintiff and hit him several times, knocking him to the ground. Plaintiff started to get away, but Wallace grabbed him by the neck, shook him, punched him, and stabbed him with a pair of scissors in the chest, hands, and the back of his head. Wallace then entered the bus, refused plaintiff's requests for help, and drove away. Although he was bleeding, plaintiff was able to walk to a friend's house approximately one block away. He subsequently received treatment at a hospital for his injuries.¹

In his second amended complaint,² plaintiff alleged that Wallace's conduct was grossly negligent. Plaintiff also alleged that defendants Albert Martin, Bomar-Parker, and Madden, administrators in the department of transportation, were grossly negligent because they failed to protect plaintiff by removing Wallace from his position as a bus driver, despite their knowledge of Wallace's violent propensities. Plaintiff also alleged negligent infliction of emotional distress against each defendant.

Martin, Madden, and Bomar-Parker moved for summary disposition, arguing that the provision of MCL 691.1407(5) providing immunity to the "highest appointive executive official" of all levels of government shielded them from suit, and that, alternatively, the public duty doctrine barred their liability. The trial court concluded that Martin was entitled to immunity under MCL 691.1407(5), but that neither MCL 691.1407(5) nor the public duty doctrine barred plaintiff's claims against Bomar-Parker and Madden. At the close of discovery, defendants moved for summary disposition, asserting the applicability of the public duty doctrine, and the trial court denied this motion.

The evidence at trial³ established that Wallace is one of approximately one thousand bus drivers employed by the Detroit Department of Transportation (DDOT). The department operates buses out of three terminals: Gilbert, Shoemaker, and Coolidge. The drivers and their

¹ Plaintiff testified that as a result of his injuries, he could not use his hands for seven or eight months after the incident and could not begin the construction job he was scheduled to start the day after the attack. He participated in physical therapy for several months, and, at the time of trial, still had intermittent pain in his hands. Plaintiff, a tennis instructor, is no longer able to play tennis and is unable to grip the racket when he teaches, but testified that he is able to teach "hands on."

² Plaintiff originally alleged (1) assault and intentional infliction of emotional distress against Wallace and (2) vicarious liability for Wallace's actions and liability under MCL 257.401 against the city of Detroit. The trial court granted the city's subsequent motion for summary disposition based on MCR 2.116(C)(7) and (8), stating that the city was not liable under MCL 257.401 and that plaintiff failed to allege any facts in avoidance of governmental immunity. In his first amended complaint, plaintiff maintained the same allegations against Wallace but amended his allegations against the city of Detroit to allege that it was grossly negligent in its failure to protect plaintiff from Wallace. The trial court again granted summary disposition to the city, holding that the city was immune whether Wallace behaved intentionally or was grossly negligent. Plaintiff did not appeal the trial court's dismissal of his claims against the city.

³ Wallace did not participate in the trial.

supervisors work at the terminals, and driver discipline is handled at the terminal level by the drivers' supervisors. The administrative offices for DDOT, including defendants' offices, are located at 1303 East Warren.

At each terminal, four levels of supervision separate the bus drivers from the district superintendent. The district superintendent is the highest ranking employee at each terminal. Under DDOT's system of "progressive corrective discipline," terminal-level supervisors investigate citizen complaints. If merited following their investigation, terminal-level supervisors have the authority to impose discipline, as detailed in the "work rules," a document describing various offenses and prescribing the level of discipline that corresponds to infractions, and the union contract.⁴ The work rules permit any supervisor at the terminal level to reprimand a driver. Additionally, each terminal's district superintendent has the authority to suspend drivers. If disciplinary options available to the terminal-level supervisors are insufficient to address a problem, the district superintendent can refer the matter to a board of review, comprised of individuals in management.

Because the work rules document is a product of negotiations between DDOT administration and the drivers' union, department administrators must employ discipline as provided in the work rules. If an employee has been subjected to disciplinary action, the employee has the right to file a grievance objecting to the discipline. The grievance process, also delineated in the union contract, culminates in binding arbitration. A person outside the DDOT management renders the arbitration decision. Department administrators may not ignore the steps of this process.

The labor contract also prescribes a process for transferring employees laterally and reclassifying employees. The process does not permit an administrator to reclassify a driver to another line of work without the driver's consent if reclassification results in a pay change or substantially different work hours. Similarly, the department cannot fire an employee without following departmental policies dictated by the union contract and civil service rules. The union contract and civil service rules also prohibit management from designing policies that treat one employee differently from another.

According to Gail Oxendine, DDOT's human resources manager, defendants Madden and Bomar-Parker may, if they wish, review an employee's personnel file. However, because the work rules govern the discipline for violations, an administrator can caution a human resources officer about an employee with a lengthy record of violations, but cannot discipline the employee. Generally, Oxendine said, review of a driver's file is conducted at the terminal level.

⁴ For example, testimony indicated that one work rule pertains to a driver who is the subject of excess citizen complaints. After the district superintendent learns of what he deems "excessive" complaints, he then forwards the information to departmental administration. The testimony did not indicate, however, the discipline that corresponds to receiving excess complaints or to which individual in departmental administration the district superintendent reports the driver.

The trial evidence also established that Wallace did not have an exemplary record before he attacked plaintiff. Oxendine testified that over a period of several years, the department received several complaints about Wallace's service, including complaints that he engaged in transfer disputes with passengers, that he hit an automobile while driving the bus, and that he operated the bus ahead of schedule. Wallace was suspended for operating ahead of schedule in April 1987 and March 1988. Terminal-level supervisors handled each of the foregoing issues.

Wallace's personnel record also reflected that in July 1987, a citizen complained that Wallace cut into a funeral procession. The department determined that evidence supporting this allegation was insufficient to substantiate the complaint. In October 1988, Wallace allegedly pulled a gun on a passenger. Again, the department concluded that it did not have sufficient evidence to support taking action against Wallace. In November 1989, Wallace was suspended for harassing a female passenger. In 1994, Wallace was suspended for fourteen days for poor attendance. In December of that year, he was suspended for assaulting a female passenger. Wallace was fired because of that incident but was later reinstated as a result of binding arbitration.

The department terminated Wallace's employment again following his assault on plaintiff. Although Wallace filed a grievance protesting his termination, an arbitrator eventually ruled against his reinstatement.

Defendant Madden, the superintendent of transportation operations for the department of transportation, testified that she manages the department's communications center, consisting of dispatchers and radio communications, and began managing street operations one month before trial. Her position requires her to monitor the service inspectors, the terminal-level supervisors who make sure the drivers are running on time and address accidents in which drivers are involved.

Madden testified that she has held a number of jobs in the department, including emergency dispatcher, assistant district superintendent of communications, assistant district superintendent for the Coolidge terminal,⁵ assistant superintendent of transportation operations, and, beginning in May 1995, superintendent of transportation operations. Madden's responsibilities as assistant superintendent of transportation operations included monitoring the number of buses in service, remedying any shortages, and ensuring compliance with bus schedules. She also assisted in planning new routes, implementing special services, and accommodating the process for drivers to request route changes, as governed by union contract. When she became the superintendent of transportation operations, her duties remained substantially the same.

While serving as assistant superintendent for transportation operations from 1992 until May 1995, Madden had some responsibilities related to discipline, transfers, promotions, and reassignments but was not involved in every disciplinary action at all three terminals. She

⁵ Because Wallace was assigned to the Gilbert terminal when Madden worked at the Coolidge terminal, Madden had no authority over him at that time.

occasionally became involved with the disciplinary process when, because of the nature of the offense, the driver was referred to a board of review and she was asked to sign the board of review notice. She only became aware of such incidents, however, if notified by terminal-level supervisors. She also participated in union negotiations and the grievance process for labor disputes.

Madden also testified that she did not know about Wallace's complete record until he was discharged for attacking plaintiff. The incident involving plaintiff was the first action by Wallace that one of Wallace's terminal-level supervisors brought to her attention. She stated that without anyone in his chain of supervision drawing his record and potential problems to her attention, she had no reason to investigate his record or recommend that he receive counseling.

Defendant Bomar-Parker testified that she has served as the department's communications coordinator, assistant director of administration, and, beginning in 1993, deputy director of the department of transportation. She testified that the deputy director of the department is not normally involved in resolving problems concerning drivers because that responsibility falls to human resources and the terminal superintendents. Accordingly, she has no knowledge of a driver's actions unless informed by another department. Bomar-Parker testified that her duties as deputy director involve developing new policies, particularly policies involving managers, but that she cannot overrule policies set in place by the work rules, civil service, or the union contract. Bomar-Parker does not have the authority to instruct a district superintendent to discharge an employee like Wallace. Additionally, she stated that any contact with Wallace concerning his possible need for counseling would have been handled by human resources and at the terminal level.

Testimony at trial also revealed that neither defendant supervises drivers on a daily basis.

The defense rested without presenting proofs and moved for a directed verdict, arguing that (1) plaintiff failed to prove proximate cause; (2) plaintiff failed to produce evidence of gross negligence; and (3) the public duty doctrine precluded holding defendants liable. The trial court denied defendants' motion on each basis.

Following its deliberations, the jury found in favor of plaintiff against all defendants. The jury awarded plaintiff \$100,000 in non-economic damages and \$75,000 in economic damages on plaintiff's claims of gross negligence. Additionally, the jury found Wallace liable for assault and battery and awarded plaintiff \$75,000 in present and future compensatory damages and \$15,000 for plaintiff's feelings of humiliation, outrage, and indignity. The jury apportioned fifty percent fault to Wallace and twenty-five percent fault each to Madden and Bomar-Parker. Following entry of judgment, defendants moved for JNOV, new trial, or remittitur. The trial court rejected defendants' arguments that they did not owe a legally cognizable duty to plaintiff and that the evidence did not support the jury's award of economic damages and, therefore, denied defendants' motion. This appeal ensued.

II. Standard of Review

This Court reviews de novo a trial court's decision concerning a motion for a directed verdict. *Derbabian v S&C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 799 (2002).

In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. . . . A directed verdict is appropriate only when no factual question exists on which reasonable minds could differ. [*Id.* at 701-702.]

III. Analysis

Defendants argue, among other things, that the trial court improperly denied their motion for a directed verdict because reasonable minds cannot differ in concluding that defendants' conduct did not amount to gross negligence. We agree. As governmental employees who are not covered by MCL 691.1407(5), defendants are immune from tort liability for acts within the scope of their authority that arise from the exercise or discharge of a governmental function, unless their conduct amounts to "gross negligence that is the proximate cause of the injury or damage."⁶ MCL 691.1407; MCL 691.1401(d).

The reasonableness of a defendant's conduct is generally a question of fact for the factfinder. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). However, if reasonable minds could not differ regarding whether the defendant's conduct amounted to gross negligence, the Court may decide that the defendant is entitled to judgment as a matter of law.⁷ *Id.*; *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 694; 558 NW2d 225 (1996). MCL 691.1407(2)(c) defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." In evaluating whether conduct rises to the level of gross negligence, we must focus on the defendant's conduct rather than the subsequent harm to the plaintiff. *Maiden v Rozwood*, 461 Mich 109, 127 n 10; 597 NW2d 817 (1999). Additionally, the proofs presented by the plaintiff must demonstrate that the defendant was "substantially more than negligent." *Id.* at 122. "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence. . . . To hold otherwise would create a jury question premised on something less than the statutory standard." *Maiden, supra* at 122-123.

Plaintiff admits in his brief on appeal that defendants "did not directly supervise defendant Wallace," but claims that defendants occupied positions of authority and could affect the placement of problem drivers. Plaintiff further claims that despite receiving documents

⁶ In *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000), the Court held that the phrase "the proximate cause," as used in MCL 691.1407(2)(c), refers to "the one most immediate, efficient, and direct cause of the injury or damage" Although defendants raise this issue on appeal, we do not address it because defendants did not preserve it for our review by raising it in the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

⁷ Although the Court in *Jackson* was evaluating a motion for summary disposition rather than a motion for a directed verdict, the same test applies. *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994).

regarding defendant Wallace's "unsettling" behavior, defendants failed take action in response, such as referring him to counseling or taking steps to reclassify him to a different position. We conclude that the evidence, when viewed most favorably to plaintiff, does not present a question of fact on the issue of gross negligence.

The evidence plaintiff presented in support of his claim that defendants had knowledge of Wallace's violent tendencies before he assaulted plaintiff consisted of departmental correspondence.⁸ Plaintiff presented evidence that departmental correspondence listed Madden as a "cc" recipient of two letters from RoseMarie Ford, a human resources officer in the department of transportation, to Gary Dent, director of human resources for the city of Detroit, concerning Wallace. The first of these letters, dated July 27, 1995, stated:

The above individual [Wallace] was suspended with a recommendation for discharge effective December 8, 1994[,] "Charged With Physically Assaulting a DOT Passenger". He was subsequently discharged effective January 7, 1995.

Mr. Wallace was returned to work effective May 3, 1995 to the position of Transportation Equipment Operator [bus driver].

The Department of transportation is requesting that the discharge be reduced to a suspension for one hundred and forty[-]six (146) days effective December 8, 1994[,] which was the date of the original suspension.

This letter also listed several other offices in the department of transportation as recipients of a copy of the letter. The second letter, dated September 25, 1995, addressed the same incident:

The above individual was suspended with a recommendation for discharge effective December 8, 1994[,] "Charged with Physically Assaulting a DOT Passenger". He was subsequently discharged effective January 7, 1995. Mr. Wallace was returned to work effective May 3, 1995 to the position of Transportation Equipment Operator, after the court found him "not guilty" of the charge.

The Department of Transportation is requesting that the suspension effective December 8, 1994 and the discharge effective January 7, 1995 be rescinded. The Department of Transportation will make him whole for all time lost.

This letter also lists several other departmental offices as recipients of a copy of the letter.

Plaintiff also presented evidence that Bomar-Parker was listed as a "cc" recipient of two documents regarding Wallace. The first document, a memo dated August 23, 1991, addressed to

⁸ The evidence also showed that defendants received letters concerning Wallace's assault on plaintiff. The post-assault letters are not relevant to our determination whether plaintiff presented a question of fact concerning defendants' conduct *before* Wallace assaulted plaintiff.

Ollie Bell, an assistant transportation district superintendent, from A. Patrick, Jr., an assistant personnel officer in the transportation department, stated:

The employees mentioned below have been identified as principles in the Henry Wallace Arbitration Case (#54 39 0800 91):

* * *

A pre-arbitration hearing is scheduled to convene on Wednesday, September 4, 1991 at 10:00 a.m. in the Personnel Office of the Administration Building at 1301 E. Warren. Will you kindly make the necessary arrangements to have these employees released from their regular assignment to attend this hearing. Thank you.

The second document, a letter dated March 3, 1992, addressed to Deno Bokas, the accounting manager, from Albert Patrick, Jr., assistant personnel manager in the department of transportation, stated:

Please be advised that the above-mentioned grievance has been heard and a determination has been rendered. Mr. Stanley T. Dobry, Arbitrator, has reduced the discipline of Mr. Henry Wallace from a nine and one-half working days suspension to a five working days suspension (see attached Arbitration Award).

Inasmuch as this Award addressed the Department's improper urgency of the initial suspension, effective November 7, 1989, it is therefore appropriate that we rescind the first four and one-half working days; November 7, 1989 through November 11, 1989. Will you kindly have your staff rescind the suspension for the above-mentioned period and expunge it from Mr. Wallace's record accordingly?

. . . Therefore, will you kindly have your staff pay Wallace [back pay]

* * *

. . . to comply with the Arbitrator's Award[?] If you have any questions regarding the above, please contact me.

Contrary to plaintiff's argument, these documents do not give defendants notice of a "ticking time-bomb." The documents sent to Bomar-Parker do not inform her of the facts underlying the arbitration hearing or tell her why Wallace was suspended. Although the documents sent to defendant Madden informed her that Wallace was suspended for assaulting a passenger, Madden ultimately learned that he was reinstated to his position after he was acquitted of the assault charge, without further explanation of the details of the case. Additionally, the testimony showed that although defendants were free to review Wallace's file, neither Madden nor Bomar-Parker were responsible for disciplining Wallace. The undisputed testimony showed that terminal-level supervisors bear the primary responsibility for driver discipline, including determining whether the driver has received complaints so excessive that the supervisor should bring the driver to the attention of departmental administration.

Moreover, plaintiff did not present evidence showing that either defendant served on a board of review for Wallace regarding his previous infractions. Although defendants had limited policy-making authority, the evidence did not show that defendants were aware, or should have been aware, that policies on driver discipline needed to be changed, or that the disciplinary hierarchy had failed with respect to Wallace. Furthermore, the testimony showed that recommendations that employees receive counseling are generally made by human resources, terminal-level supervisors, or the drivers' union. In short, the steps plaintiff faults defendants for failing to take were not part of defendants' general responsibilities and were traditionally handled by other offices. Under these circumstances, the evidence was insufficient to establish that defendants' failure to review Wallace's file in response to receiving the above-quoted documents showed a substantial lack of concern for whether an injury would result, and the trial court improperly denied defendants' motion for a directed verdict. In light of our conclusion on this issue, we need not address defendants' remaining arguments. See *Star-Batt, Inc v Rochester Hills*, 251 Mich App 502, 512; 650 NW2d 442 (2002). While we find it difficult to understand how a driver with Wallace's record and propensities could have remained as a driver, we are constrained to conclude that plaintiff failed to make a showing of gross negligence with respect to Madden and Bomar-Parker.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kurtis T. Wilder